GROWTH ENTERPRISE SDN BHD v. RAFAEH MOHAMAD NOR & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
STEPHEN CHUNG J
[CIVIL SUIT NO: SDK-22NCVC-15-12-2013]
12 JANUARY 2016

CONTRACT: *Agreement – Land – Parties entered into separate agreements in respect of land – No consideration, compensation or payment or rental to be paid to landowners for use and occupation of land – Agreement made without consideration – Whether valid – Whether dealings affecting lands legal – Whether ought to be set aside – Sabah Land Ordinance, s. 17(1)*

LAND LAW: *Transfer – Validity – Parties entered into separate agreements in respect of land – Special conditions in documents of title explicitly stated that transfer and sublease of land title is prohibited unless written permission is first obtained – Failure to obtain written permission – Whether non-compliance with special conditions rendered transfer and sublease void – Contracts Act 1950, ss. 24, 26*

The plaintiff entered into separate agreements with the second to eighth defendants in respect of their land. The plaintiff had developed the land into an oil palm plantation and had been in occupation of the land for more than 20 years. In 2012 and 2013, the first defendant unlawfully entered the land and interfered with the management and occupation of the plaintiff's oil palm plantation. The plaintiff (i) applied for an injunction to restrain the first defendant from entering, developing and otherwise dealing with the land; and (ii) claimed for damages from the second to eighth defendants for damages *in lieu* of specific performance of their respective agreements entered with the plaintiff. In their defence, the first to seventh defendants pleaded that (i) they were illiterate; (ii) did not understand the agreements; and (iii) several agreements were void on the grounds of misrepresentations, mistakes of facts, undue influence and unfair, unjust and unequal bargaining power. In their counterclaim, they sought declaratory orders that the agreements were void. However, on the day of the trial, the parties informed the court that they did not wish to proceed with the trial but to have it determined on a point of law under O. 14A or O. 33 r. 2 of the Rules of Court 2012, namely, whether the agreements between the plaintiff and the defendants were void.

Held (order accordingly):

(1) Paragraph 5 of the special conditions in the documents of title explicitly stated that transfer and sublease of the land title is prohibited unless the written permission of the Director of Lands and Surveys is first obtained. The plaintiff did not state that it had obtained the said written permission and did not exhibit the said permission to establish that it had complied with para. 5 of the special conditions in the land title. The

plaintiff thus failed to comply with the special conditions. Therefore, the transactions to sublease in respect of the several parcels of land were prohibited, unlawful and void under s. 24 of the Contracts Act 1950 ('the Act'). (para 39)

(2) There was no mention in the agreements, of any consideration, compensation or payment or rental to be paid to the defendants as landowners for the use and occupation of their land or that the agreements were made on account of natural love or affection between the parties standing in a near relation to each other. An agreement made without consideration is void under s. 26 of the Act. The dealings affecting the lands of the second to eighth defendants in respect of native land were illegal and forbidden under s. 17(1) of the Sabah Land Ordinance. The agreements were set aside. (paras 40 & 44)

Case(s) referred to:

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 136 FC ***(refd)***
Hj Abdul Rahman & Anor v. Mohamed Hassan [1917] AC 209 ***(refd)***
Idris Hj Mohamed Amin v. Ng Ah Siew [1935] 1 LNS 15 HC ***(refd)***
International Bank Malaysia Bhd v. Lovintih Balantai [2007] 6 CLJ 279 CA ***(refd)***
Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued as Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***
Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2012] 9 CLJ 1014 CA ***(refd)***
Pawa Ajah v. Chung Kok Chiang & Anor [2002] 8 CLJ 751 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 26
Land Ordinance (Sabah) (Cap 68), ss. 4, 13, 17(1), (5), 64, 87, 88
Rules of Court 2012, O. 14A, O. 33 r. 2

For the plaintiff - Jeyan Marimuttu & Claudia Lopez; M/s J Marimuttu & Partners
For the 1st & 2nd plaintiffs in the counterclaim, and for the 2nd & 8th defendants - Sharatha Masyaroh John Ridwan Lincon; M/s Lincon & Co
For 1st, 3rd, 4th, 5th, 6th & 7th defendants - Zaleha Mohd Yusuf Pan; M/s Peter Lo & Co

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] This suit was fixed for trial on 30 November 2015. Parties have filed their amended pleadings and have requested for five days for the trial because it involved eight defendants and the eighth defendant with her husband have filed an action by way of counterclaim against the plaintiff and some of the defendants. The plaintiff has filed a statement of agreed facts and parties have filed bundles of documents for the trial.

[2] The plaintiff pleaded that it has entered into separate agreement with the second to the eighth defendants in respect of their land and that it has developed the land into an oil palm plantation and has been in occupation of the land for more than 20 years. It pleaded that in 2012 and 2013 the first defendant unlawfully entered the land and interfered with the management and occupation of the plaintiff's oil palm plantation.

[3] In the amended writ and statement of claim the plaintiff prayed, *inter alia,* (a) that an injunction be granted to restrain the first defendant, his servants or agents or howsoever from entering, developing and or otherwise dealing with the land namely Lot 2, Lot 6, Lot 27, Lot 31, Lot 10, Lot 16, Lot 11 of Block 1 and Lot 11 of Block 2; and (b) against the second to eighth defendants for damages *in lieu* of specific performance of their respective agreement entered into with the plaintiff.

[4] In the amended defence, the first to seventh defendants pleaded that they were illiterate, did not understand the agreements and that the several agreements were void on the grounds of misrepresentations, mistakes of facts, undue influence and unfair and unjust unequal bargaining power. In their amended counterclaim, they sought declaratory orders that the agreements were void and in the alternative that they were void under s. 24 of the Contracts Act 1950 in contravention of s. 17 of the Sabah Land Ordinance (SLO). The fourth defendant filed a similar defence and counterclaim.

[5] The eighth defendant has filed an amended defence. She and her husband have filed an action by way of counterclaim against the plaintiff and some of the defendants.

[6] On 20 December 2013 the plaintiff obtained an interlocutory injunction to restrain the first defendant from entering or carrying out any development or dealing with the several parcels of land until further order of the court.

[7] Based on the pleadings, there were issues of facts and law which ought to go for trial.

[8] However, on the day of trial, parties informed the court that they did not wish to proceed with the trial but to have it determined on a point of law under O. 14A and or O. 33 r. 2 of the Rules of Court 2012 ie, whether the agreements between the plaintiff and the defendants were void. The plaintiff has filed the application and counsel for the defendants informed the court that they would not file any affidavit to the application but would submit on the application.

[9] The parties applied for time to work out the agreed issues. Subsequently, the first, second, third, fifth, sixth and seventh defendants withdrew all their prayers in their amended defence and counterclaim except

for prayers 28.2 to 28.5 therein and withdrew all their prayers in their defence to the counterclaim of the eighth defendant except for prayers 33 (D) to (F) therein. Similarly the fourth defendant withdrew all her prayers in her amended defence and counterclaim except prayers 29.2 to 29.6 therein. The parties agreed that the remaining prayers were in respect of the issue only on the legality of the agreements entered into with the plaintiff.

[10] In respect of the action by way of counterclaim of the eighth defendant and her husband, they withdrew all their prayers except for prayer 25.4 and prayer 25.5 therein which were also on the issue of the legality of the agreements, with liberty to file a separate suit subject to terms and conditions which were not relevant to this application under O. 14A.

[11] Parties agreed that there are no disputes of facts and that parties would submit on the facts and law based on the statement of agreed facts and the agreed bundles of documents which formed the basis of this O. 14A application.

[12] Order 14A provides that the court may upon the application of a party or on its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or claim or issue therein. To determine the application under O. 14A, all the necessary and material facts relating to the subject matter of the question must have been duly proved or admitted. This postulates that there is no dispute or further dispute exists as to the relevant facts at the time the court proceeds to determine the question: see *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued as Incorporated Partnership)* [2015] 9 CLJ 273.

[13] In this O. 14A application, the questions to be determined include:

(i) Whether the seven agreements between the plaintiff and the second to eight defendants for the development of the several parcels of land into an oil palm plantation contravene s. 17 of the Sabah Land Ordinance and are tainted with illegality and therefore void under s. 24 of the Contracts Act;

(ii) If the answer to (i) above is in the negative, whether the defendants have unlawfully interfered with the rights and interest of the plaintiff under the agreements and had unlawfully terminated the agreements; and

(iii) If the answer to (ii) is in the affirmative, whether the defendants are liable to the plaintiff for loss and damages and if so, what is the quantum of the damages?

[14] Based on the agreed facts and bundles of documents, the second to the eighth defendants were alienated parcels of land by the Sabah Government, each parcel of approximately 15 acres, in the Luang Manis Smallholders

Scheme and subsequently issued with the documents of native title. The defendants did not have the financial means to cultivate and develop their land.

[15] On 29 December 1989, and on other dates, the plaintiff entered into separate agreement with each of the second to eighth defendants to give possession and for the plaintiff to develop the several parcels of land into the oil palm plantation. The plaintiff has built an oil palm mill and an oil palm mill effluent treatment plant on Lot 11 Block 2.

[16] The second defendant had sold and transferred his land to the first defendant on 12 December 2012. The third defendant had sold and transferred her land to the first defendant on 17 March 2011. The fourth defendant had sold and transferred his land to the first defendant on 20 October 2011. The sixth defendant had sold and transferred his land to the first defendant on 12 December 2012. The seventh defendant had sold and transferred her land to the first defendant on 12 September 2012.

[17] The second, third, fourth and seventh defendants had passed away and sued in the name of their administrator or personal representative.

[18] The plaintiff has been unable to serve the amended writ and statement of claim on the personal representative of the second defendant because the plaintiff did not know the personal representative of the second defendant to be served and no application has been made to administer his estate. For the reasons given in this ruling, it made no difference.

[19] The first to the seventh defendants have terminated or sought to terminate the above agreements but the eighth defendant has yet to terminate her agreement with the plaintiff.

[20] The plaintiff referred to ss. 4, 17, 64, 87 and 88 of the SLO and submitted that a dealing refer to a transaction by which native land is affected under the Ordinance and a land is affected where a party acquires rights or interests in land either by way of transfer, sublease, charge or other forms of interests therein which are capable of registration in accordance with the provisions of SLO. It submitted that such transaction or agreement must affect interests in land as set out in the relevant provisions of SLO.

[21] It submitted that these were pure and simple agreements which were contractual in nature and did not deal with the land *per se*. It submitted that under the agreements it was merely appointed the contractor to develop the several parcels of land which did not amount to any conveyance of any property in title, let alone any transfer of any title or interest in the land. It submitted that the agreements did not create any interest on land nor did they create any registerable interests in land and therefore could not amount to any dealings in the land within the meaning of s. 4 and not caught by s. 17(1) of the SLO. The plaintiff cited several authorities in support: see *Haji Abdul*

Rahman and Another v. Mohamed Hassan [1917] AC 209; *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136; *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2012] 9 CLJ 1014; 15 *International Bank Malaysia Bhd v. Lovintih Balantai* [2007] 6 CLJ 279.

[22] The plaintiff submitted that the agreements it entered into with the second to the eighth defendants do not contain any specific terms on the duration of the plaintiff's appointment as the contractor to develop the land but that there is an express term in the agreements that in the event the defendants terminate the agreements, they are liable to pay compensation to the plaintiff as per the quantum set out in their respective agreement.

[23] The plaintiff submitted that it came within the provision of s. 17(5) of the SLO because there is no express term of the duration of the plaintiff's appointment as the contractor. The plaintiff submitted that the defendants were at liberty to terminate the agreements by giving three months written notice.

[24] Reading the agreements between the plaintiff and the second to the seventh defendants, cls. 1 and 2 provide that the landowner engages the contractor to develop and cultivate the land with oil palm. Clauses 3 and 4 provide that in consideration of the contractor agreeing to develop the land, the landowner agrees that all produce of oil palm from the land belong to the contractor and it is entitled to harvest and sell the oil palm without interference from the landowner.

[25] Clause 6 provides that the landowner may terminate the agreement and re-enter the land by giving three months' notice in writing. If it is terminated prior to 1 January 1991, the landowner shall pay compensation at a rate of RM3,300 per acre and RM3,900 per acre if it is terminated after 1 January 1991. This was amended to RM6,900 per acre in an addendum to the agreement.

[26] The question is whether the agreements contravene s. 17 of the SLO and tainted with illegality and therefore void under s. 24 of the Contracts Act.

[27] Section 17(1) of the SLO states that except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before 16 January 1883, or in the terms of the next following.

[28] Section 17(5) states that notwithstanding the provisions of this section and s. 64, it shall be lawful for the owner of the land held under the provisions of Part IV to grant a sublease of such land to a non-native for a term not exceeding thirty years.

[29] In reading s. 17, the court firstly has to determine the intention of the legislation by reading the relevant sections of the legislation and then to examine the transaction that has been entered into between the plaintiff and the defendants as a whole before deciding whether there is an attempt to evade the provisions of the legislation: *Idris Hj Mohamed Amin v. Ng Ah Siew* [1935] 1 LNS 15; [1935] 1 MLJ 257; *Pawa Ajah v. Chung Kok Chiang & Anor* [2002] 8 CLJ 751.

[30] Reading the SLO, including ss. 13, 17 and 64, it is to protect native title land and native customary rights to land in Sabah and to prohibit the sale and transfer of such land to non-natives. Section 17(1) clearly imposes a bar on any dealings involving a non-native on one part and a native on the other: *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2012] 9 CLJ 1014; [2013] 1 MLJ 597.

[31] Under the agreements, the defendants did not specifically sell or transfer their land to the plaintiff. However they gave possession of the land to the plaintiff to develop the land into the oil palm plantation. Were the transactions caught by s. 4 of the SLO?

[32] Under s. 4, 'dealing' means any transaction of whatever nature by which land is affected under the Ordinance. Although the plaintiff submitted that it is merely a contractor developing the land and not dealing with the land, reading the definitions in s. 4 and the other relevant provisions in the SLO, any transaction of whatever nature by which the land is affected under this Ordinance, it is affected if the land is sold, transferred, charged, subleased or occupied in consideration of rent, whether in money or kind.

[33] It is not in dispute as follows:

(i) the first to the eighth defendants are natives of Sabah and were alienated with the native title land in the Luang Manis Smallholders Scheme;

(ii) the plaintiff is not and has not been declared or approved as a native company in Sabah entitled to acquire, charge, mortgage, own or deal with native title land;

(iii) the plaintiff has not obtained the written permission of the Minister to deal with the native title land belonging to the defendants; and

(iv) the agreements between the plaintiff and the defendants were entered into in 1989 and thereafter, well after 16 January 1883.

[34] There is no mention of any sale, transfer or charge of their land to the plaintiff and there is also no mention of any dealing, lease, sublease or letting of the land to the plaintiff in the agreements. The agreements were drafted as such to circumvent the provisions of the SLO, in particular s. 17 of the SLO. The transactions between the plaintiff and the defendants under the agreements agreed for the plaintiff to take possession, occupy and develop the land into an oil palm plantation for an indefinite term of years to harvest,

sell or process the fruits of the oil palm to the exclusion of the defendants as the landowners and without any consideration, compensation or benefit to them as landowners provided for in the agreements.

[35] Although there is no consideration or compensation or rental stated in the agreements, the plaintiff had exhibited payment vouchers which showed that the plaintiff had paid the defendants for the land. At p. 57 of the plaintiff's bundles of documents, the payment voucher in the name of the third defendant stated that the payment was 'for land' for Lot 27. At p. 62, the payment voucher in the name of the second defendant was for Lot 2 Block 6 amounting to RM2,300. Similarly, at p. 65, the payment voucher in the name of the fourth defendant was for payment for Lot 31 Block 2, again amounting to RM2,300. The plaintiff did not explain whether the payments were for the land or for rentals or whether as loans provided to the defendants in return for the use of the land.

[36] Based on the payment vouchers exhibited, these payments were for the land and amounted to a dealing affecting the land although the parties have not exhibited any sale and purchase agreements in respect of the transactions. Based on the native land titles exhibited, the second, third, fourth, sixth and seventh defendants had sold and transferred their land to the first defendant.

[37] If these transactions between the plaintiff and the defendants did not amount to a sale of the land, because they sold the land to the first defendant, these transactions would amount to a sublease of their land by the second to the seventh defendants to the plaintiff based on the payments made. The plaintiff has submitted that it came within s. 17(5) of the SLO. These transactions were dealings in land between the plaintiff and the defendants and were transactions by which their land was or is affected under the SLO. The agreements tantamount to subleases affecting the native title land of the second to the seventh defendants.

[38] Section 17(5) of the SLO prohibits any sublease of native land to a non- native for a term exceeding 30 years. The facts show that the plaintiff has been in possession and occupation of the land since 1989, for more than 25 years, and approaching 30 years. The plaintiff has deliberately omitted and failed to state or include the number of years or the duration of the agreements or subleases in respect of the land between the plaintiff and the defendants in order to circumvent or to evade the prohibition under s. 17(5) of the SLO.

[39] Paragraph 5 of the special conditions in the documents of title, which were also referred to in the valuation report prepared by CH Williams Talhar & Wong exhibited by the plaintiff, explicitly states that transfer and sublease of this title is prohibited unless the written permission of the Director of Lands and Surveys is first obtained. The plaintiff did not state that it has obtained the said written permission and has not exhibited the said permission to establish that it has complied with para. 5 of the special

condition in the land titles. Therefore the plaintiff has failed to comply with the special conditions and the transactions amounting to sublease in respect of the several parcels of land are prohibited, are unlawful and void under s. 24 of the Contracts Act.

[40] Further, reading the agreements, there is no mention of any consideration, compensation or payment or rental to be paid to the defendants as landowners for the use and occupation of their land or that the agreements were made on account of natural love or affection between the parties standing in a near relation to each other. Based on the agreements, the second to the seventh defendants did not obtain or derive any benefits from parting possession of their land to the plaintiff for nearly 30 years bearing in mind that under the agreements the plaintiff has obtained all the benefits and profits from the transactions to the exclusion of the defendants. An agreement made without consideration is void under s. 26 of the Contracts Act.

[41] In respect of the agreement between the plaintiff and the eighth defendant, the plaintiff gave possession of Lot 26 and Lot 27 of Block 2 to the eighth defendant in exchange of Lot 7, Lot 10, Lot 11 and Lot 12 of Block 2 in the Luang Manis Smallholders Scheme.

[42] The plaintiff did not affirm that it was or is the owner of Lot 26 and Lot 27. The plaintiff has not exhibited a copy of the document of title in respect of these parcels of land. Based on the agreed facts and bundles of documents, it could not be the owner of Lot 26 and Lot 27 which are native title land. The plaintiff did not disclose the registered owners, how the plaintiff came to be in possession of these parcels of native land, whether there was any agreement signed in respect of the land, whether it was a sale, a charge or sublease, whether the plaintiff has obtained the consent of the registered owners and whether they have agreed for the two parcels of land to be exchanged with those of the eighth defendant. The plaintiff has failed to establish that the exchange in respect of these parcels of land was not forbidden by s. 17 of the SLO.

[43] The transaction between the plaintiff and the eighth defendant to exchange Lot 26 and Lot 27 with Lot 11 comes within the meaning of a dealing under s. 4 of the SLO and has contravened s. 17(1) of the SLO.

[44] For the reasons given, these transactions were dealings affecting the land of the second to eighth defendants in respect of native land which were illegal and forbidden under s. 17(1) of the SLO. The agreements being void are set aside.

[45] The first defendant has purchased and became the registered owner of the several parcels of land from the second, third, fourth, sixth and seventh defendants. There is nothing to prohibit or prevent the sale of the several parcels of land by the second, third, fourth, sixth and seventh defendants to the first defendant. The first and fifth defendants being the registered owners of the several parcels of land are entitled to deal with and apply for possession of the land.

[46] Are the defendants liable to the plaintiff for loss and damages as provided under the agreements? The plaintiff has pleaded the quantum of damages as set out in the respective agreement against the defendants. The plaintiff has also exhibited the valuation report which showed the value of the land after the land has been developed by the plaintiff.

[47] The plaintiff has been in possession of the land and has been harvesting and selling the oil palm fruits for about 25 years. The plaintiff did not set out, including in the valuation report, the tonnage of oil palm fruits it has been harvesting and how much profits it has derived from its use and development of the land. The plaintiff did not set out any loss that it has sustained if the agreements were terminated or set aside.

[48] Based on the provisions of the SLO and the special conditions in the land titles, the plaintiff was and is prohibited from entering into the transactions with the defendants. Notwithstanding that, the plaintiff had entered into the several agreements at its own risks. The plaintiff must bear and accept those risks. It is not entitled to damages.

[49] The interlocutory injunction granted on 20 December 2013 is hereby discharged. Costs of RM7,500 to the first, third, fourth, fifth, sixth or seventh defendants jointly and costs of RM7,500 to the second and eighth defendants jointly, plus *allocatur*'s fee to be paid by the plaintiff. Court order cannot be sealed unless *allocatur* has been paid.